STATE OF MICHIGAN

COURT OF APPEALS

SEAN RHEINSCHMIDT, Personal Representative of the Estate of SEAN GORETSKI, Deceased,

Plaintiff-Appellee,

v

GARY FALKENBERG, D.O., and G. FALKENBERG, D.O., P.C.,

Defendants-Appellants.

UNPUBLISHED
March 30, 2006

No. 261318
Livingston Circuit Court
LC No. 04-021054-NM

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

In this wrongful death medical malpractice action, defendants Gary Falkenberg, D.O., and G. Falkenberg, D.O., P.C., appeal by leave granted from the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7). We conclude that plaintiff Sean Rheinschmidt, the successor personal representative for the decedent's estate, timely filed this action under the wrongful death saving provision, MCL 600.5852. Therefore, defendants were not entitled to summary disposition. Accordingly, we affirm.

The basic facts are undisputed. The decedent, Sean Goretski, was treated by defendant Gary Falkenberg, D.O., on June 6 and 7, 2001. Plaintiff alleges that defendant Falkenberg failed to properly diagnose the decedent, who was hospitalized on June 11, 2001, and diagnosed with pneumococcal pneumonia and pneumococcal meningitis. On July 18, 2001, after suffering seizures and a brain stem infarct, the decedent died. On June 11, 2002, the probate court issued letters of authority appointing the decedent's widow as the personal representative of the decedent's estate. On April 28, 2004, she mailed a notice of intent to file a medical malpractice claim against defendants. She took no other significant action as the personal representative of the estate. Subsequently, on September 16, 2004, the probate court issued letters of authority appointing plaintiff as the successor personal representative of the decedent's estate. On October 28, 2004, plaintiff commenced this wrongful death medical malpractice action against defendants.

Defendants thereafter moved for summary disposition, arguing that it was undisputed that the original personal representative failed to timely file an action within the two-year medical malpractice limitations period set by MCL 600.5805(6), which expired on June 7, 2003. Defendants further argued that, under *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), the

two-year period set by MCL 600.5852, the wrongful death saving provision, was not tolled by the original personal representative's filing of a notice of intent. In opposing defendants' motion, plaintiff argued that the action was timely under § 5852 and *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), because it was brought within two years from the date letters of authority were issued to him, and less than three years after the medical malpractice period of limitations expired. Plaintiff further argued that *Waltz, supra*, is inapplicable to these facts. The trial court denied defendants' motion, seemingly concluding that the action was timely filed because the filing of the notice of intent by plaintiff's predecessor tolled the wrongful death saving provision.

We conclude that plaintiff's action was timely filed, and that defendants were not entitled to summary disposition pursuant to MCR 2.116(C)(7). Whether a period of limitation applies in particular circumstances is a legal question that we review de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). The trial court's grant or denial of summary disposition under MCR 2.116(C)(7) is also reviewed de novo. *Waltz, supra* at 647-648.

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Id.* (citation omitted).]

"'[I]n all actions brought under the wrongful death statute, the limitations period will be governed by the provision applicable to the liability theory of the underlying wrongful act.'" *Jenkins v Patel*, 471 Mich 158, 164-165; 684 NW2d 346 (2004) (citation omitted). Therefore, we must apply the two-year medical malpractice statute of limitations. See MCL 600.5805(1) and (6)[1]; MCL 600.5838a(2); *Jenkins, supra* at 165; *Waltz, supra* at 648.

Here, it is undisputed that plaintiff's complaint was not filed until October 28, 2004, after the two-year medical malpractice period of limitations expired on June 7, 2003. Because plaintiff's predecessor did not file an action on behalf of the decedent before the two-year period of limitations ran, plaintiff must demonstrate that a statutory exception to the limitations period applies. See *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 571; 703 NW2d 115 (2005). There are two exceptions relevant to this case, the notice tolling provision, MCL 600.5856(d),[2] and the wrongful death saving provision, MCL 600.5852.

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[1] Former MCL 600.5805(5) was renumbered as subsection (6), effective March 31, 2003, pursuant to 2002 PA 715. Because subsection (5) prescribed the period of limitation applicable at the time plaintiff's cause of action accrued, MCL 600.5838a(1), we refer to subsection (5) in our analysis.

[2] Effective April 22, 2004, subsection (d) of § 5856 became subsection (c), and was reworded in a manner that does not appear to change the substantive meaning of the provision. 2004 PA 87.

At the time this action arose in 2001, the notice tolling provision, MCL 600.5856, provided that the "statutes of limitations or repose" is tolled in the following relevant circumstance:

> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

"Thus, under this provision, filing a notice of intent to sue will toll any period of limitations or repose, if such period of limitations or repose would otherwise bar the claim, for the time set out in the written notice of intent provision (MCL 600.2912b(1)), that is, for a period not longer than 182 days." *Farley*, *supra* at 572.[3]

Under the above statutory provision, plaintiff's action was not timely filed. The latest date of the alleged malpractice is June 7, 2001, the last date the decedent was seen by defendant Falkenberg, and the two-year medical malpractice limitation period therefore expired on June 7, 2003. Plaintiff's predecessor filed her notice of intent on April 28, 2004, beyond the two-year period. In *Waltz*, *supra* at 651, our Supreme Court held that no tolling of the medical malpractice limitation period occurred under § 5856(d), because the plaintiff gave notice of her intent to sue outside the two-year period of limitation. Because the notice here was not timely filed, the limitations period was not tolled under this exception. MCL 600.5856(d).

Extension of the two-year medical malpractice period of limitation also may occur in the context of a wrongful death action. MCL 600.5852 provides as follows:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run. [MCL 600.5852.]

"Section 5852 is a *saving* provision designed 'to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.'" *Waltz*, *supra* at 655 (citation omitted). Under this provision, "a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after the letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired." *Farley*, *supra* at 572-573. Thus, in addition to the two-

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[3] In MCL 600.5838a(2), the Legislature provided that in addition to "the applicable period prescribed in section 5805 or sections 5851 to 5856," a malpractice plaintiff may also file suit "within 6 months after the plaintiff discovers or should have discovered the existence of the claim." The parties do not rely on the discovery rule in this case.

year period of limitation in § 5805(5), a personal representative may have up to an additional three years to file a wrongful death medical malpractice claim. *Waltz*, *supra* at 648-649, 652 n 14.

In this case, the original letters of authority were issued to plaintiff's predecessor on June 11, 2002. Under § 5852, therefore, she had an additional two years, until June 11, 2004, to file suit. As previously indicated, plaintiff's predecessor did not file a complaint. Rather, plaintiff filed suit on October 28, 2004. Thus, relying only on the saving provision and the date of the issuance of the *original* letters of authority, the complaint in this case would be untimely, because it was filed after the expiration of the wrongful death saving provision as measured from the issuance of the *original* letters of authority.

We agree with defendants that the trial court erred in reasoning that plaintiff's predecessor's filing of a notice of intent to sue under MCL 600.2912b operated to toll the wrongful death saving period in MCL 600.5852. In *Waltz*, *supra* at 655, our Supreme Court specifically held that § 5856(d), which applies only to statutes of limitation or repose, "does not operate to toll the additional period permitted under § 5852 for filing wrongful death actions." See also *Farley*, *supra* at 575:

> Waltz squarely held that the notice tolling provision (MCL 600.5856(d)) "explicitly applies only to the 'statute of limitations or repose,'" and therefore "does not operate to toll the additional period permitted under (MCL 600.5852) for filing wrongful death actions." This holding clearly applies to the two-year period in the wrongful death saving provision (MCL 600.5852).

Additionally, contrary to the trial court's apparent belief, the three-year period mentioned in the second sentence of § 5852 does not establish a wrongful death saving period separate from the period of two years after issuance of letters of authority. "[T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself." *Farley*, *supra* at 575. The Court in *Farley* explained:

> We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it. [*Id.* at 573 n 16 (emphasis in original).]

Thus, the trial court erred to the extent that it relied on the incorrect interpretation of the relevant statutory provisions in denying defendants' motion for summary disposition.

We conclude, however, for different reasons, that defendants were not entitled to summary disposition. As argued by plaintiff below and on appeal, *Waltz* and the related cases cited by defendants have no effect on the situation here in which the successor personal

representative's complaint was timely solely under § 5852. In *Eggleston, supra*, our Supreme Court addressed the issue whether a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute where the initial personal representative died before a complaint was filed. *Id.* at 30. The Court rejected this Court's "narrow reading" to the contrary, and held that a successor representative could make use of his own additional saving period. The Court stated:

> The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative. [*Id.* at 33.]

The Court concluded that, because the successor personal representative filed the complaint within two years after letters of authority were issued to him, and less than three years after the period of limitations had run, the action was timely. *Id.*

Here, the original personal representative, who was issued letters of authority on June 11, 2002, had two years from that date, until June 11, 2004, to commence a wrongful death medical malpractice action. But she never filed a complaint. Plaintiff was appointed successor personal representative, and issued letters of authority on September 16, 2004. Under § 5852, plaintiff, as the successor personal representative, had from the date of his appointment, September 16, 2004, until June 7, 2006, three years after the expiration of the medical malpractice limitation period, to bring a wrongful death medical malpractice claim on behalf of the decedent's estate. Plaintiff filed his complaint on October 28, 2004, less than two months after his letters of authority were issued. Because plaintiff, as the successor personal representative, filed a complaint within two years after letters of authority were issued to him, and less than three years after the medical malpractice period of limitations had run, the action was timely. MCL 600.5852; *Eggleston, supra*.[4]

Therefore, defendants were not entitled to summary disposition. Although the trial court might have stated an incorrect basis for denying defendants' motion for summary disposition, this Court will uphold a trial court's ruling on appeal when the right result issued, albeit for the wrong reason. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 82; 709 NW2d 174 (2005). Consequently, we affirm the denial of defendants' motion for summary disposition.

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[4] We further reject defendants' contention that *Eggleston* is properly applicable only to situations where a successor representative is appointed by necessity rather than by choice. MCL 600.5852 contains no such limitation, and we decline to read it into the plain language of the statute. Further, we find the present case distinguishable from *McLean v McElhaney*, 269 Mich App 196, ___; ___ NW2d ___ (2005), because in *McLean* the purported successor personal representative tried to revive an untimely, but otherwise valid, complaint. Here, plaintiff is not trying to revive an untimely complaint but rather filing an original complaint under the two-year saving provision afforded to him by the issuance of his letter of authority.

In light of our decision, it is unnecessary to address defendants' remaining arguments on appeal concerning the retroactive application of *Waltz*, the applicability of the doctrine of judicial tolling, and whether applying *Waltz* retroactively would violate plaintiff's right to due process.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O'Connell